BRIEF IN SUPPORT OF PETITION

Opinions Below

The District Court's opinion, with findings and conclusions (R. 219-236), is reported in 43 F. Supp. at page 339.

The opinion of the Circuit Court of Appeals (R. 242-244) is not yet reported.

Jurisdiction

The decision of the Circuit Court of Appeals below was filed December 12, 1942 (R. 242-244). No petition for rehearing was filed. Jurisdiction to issue the writ rests on Section 240(a) of the Judicial Code (28 U.S.C., Sec. 347) as amended by the Act of February 13, 1925.

Statement

The facts and rulings material to the consideration of the questions presented are fully stated in the foregoing petition. Unless otherwise indicated, all emphasis appearing herein is petitioners'.

Summary of Argument

The points of argument follow the specification of errors and the reasons relied upon for the allowance of the writ of certiorari.

ARGUMENT

I.

The Circuit Court of Appeals erred in holding that Petitioners' employees are not engaged in a service establishment the greater part of whose servicing is in

Intrastate Commerce withing the meaning of Section 13(a) (2) of the Act.

Section 13(a) (2) of the Act provides:

> "The provisions of Sections 6 and 7 (pertaining to wages and hours) shall not apply with respect to * * * any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate Commerce."

The Act neither defines the term "service establishment" nor directs or authorizes the Administrator, respondent herein, to do so.

Without discussing the matter, the court below simply held that petitioners' business did not constitute a service establishment. The only reason assigned for this decision was KIRSCHBAUM v. WALLING, supra, and "analogous reasoning." A careful study of the KIRSCHBAUM decision fails to disclose its applicability to this point or what the analogous reasoning was or could have been. The facts in this case are readily distinguishable from those in the KIRSCHBAUM case. Furthermore, in deciding that case this court merely held, so far as the claimed exemption is concerned, that "selling space in a loft building is not the equivalent of selling services to consumers, and, in any event, the 'greater part' of the 'servicing' done by the petitioners here is not in intrastate commerce." This court has not rendered any decision with reference to the application of the service establishment exemption to a business devoted exclusively to the sale and rendition of service, the greater part of which is in intrastate commerce; nor does this court now have pending before it, so far as petitioners have been able to learn, a case requiring such a decision.

In the absence of proof to the contrary, it is proper to assume that Congress used the term "service establishment" intending that it should have its usual and customary meaning.

We can think of no more descriptive phrase to apply to petitioners' business than that of "service establishment." The whole business is predicated upon the rendition of a class of service to ultimate consumers thereof. The watchman and patrol service performed for clients is complete in itself; it is not necessary for any service to either precede or follow it in order to accomplish fully the result said service is designed to produce. The word "establishment" is defined in Funk & Wagnall's Standard Dictionary as "something established, *as a body of employees,* a military organization, or a state church." If the exemption in question means anything at all, it must include "bodies of employees" whose work is the rendition of some specialized form of service, such as the night watch and patrol service here involved.

Respondent has heretofore contended, as outlined in his Interpretative Bulletin No. 6, that the service establishment exemption should be limited to businesses such as barber shops, beauty parlors, public baths, scalp-treatment establishments, masseur establishments, funeral homes, crematories, home laundries, shoe-shining parlors, etc. To sustain this contention would convict Congress of inserting a meaningless and nugatory exemption. Surely these activities are purely local in their nature and need no exemption.

Respondent has heretofore argued that, if the exemption is not confined as contended by him, then the expressed exemptions applying to stockyards handling livestock, carriers by air, railroads, motor carriers, etc., are superfluous because encompassed within the terms of Section 13 (a) (2). This argument is unsound. The service establishment exemption applies only to those establishments *the greater part of whose servicing is in intrastate commerce.* The exemption of stockyards, carriers by air, railroads, motor carriers, etc., is applicable *regardless of the extent of their interstate activities.* The error in respondent's reasoning is further illustrated by Section

13 (a) (9), 29 U.S.C., 213 (a) (9), which exempts "any employee of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, *not included in any other exemption contained in this section.*" The words "not included in any other exemption contained in this section" have, and can have, reference only to the service establishment exemption included in the same section of the Act. No other exemption in the same section can possibly apply. These words clearly show that Congress understood that employees of a street, suburban or interurban electric railway, local trolley or motor carrier *were already exempt as engaged in a service establishment provided the greater part of their employer's servicing was in intrastate commerce.* Congress desired to make the exemption absolute as to such employees and consequently Section 13 (a) (9) was included for this purpose.

A number of the lower federal courts have repudiated the narrow construction which has been placed upon "retail or service establishments" by the Administrator in Interpretative Bulletin No. 6. In said bulletin it is stated that a linen service company is not a service establishment because it renders a substantial portion of its service to commercial clients. In LONAS v. NATIONAL LINEN SERVICE CORP. (U.S.D.C., Tenn.) 5 W.H.R. 533, the court held directly to the contrary and said:

> "In actuality this motion of defendant to dismiss the proceedings turns on whether departmental interpretative bulletin is in fact an interpretation and application of Section 13 (a) (2) of the Fair Labor Standards Act of 1938, or *is merely a misconstruction of clear and unambiguous language.*
>
> "The court is aware of the respect to which the construction and opinions of administrators are entitled where the language is such that from it more than one congressional intent can be spelled, and where the administrative construction has been acquiesced in until

it is more than a mere opinion as to what Congress may have intended outside and beyond what the words they employed are usually taken to mean.

"The exemption created by Section 13(a) (2) is not subject to the narrow coverage contended for by the plaintiffs, in my opinion. A service establishment to be entitled to the exemption *need not bring itself within the qualifying test of the interpretative bulletin.* The exemption in the Act does not limit its customers nor require them to sell at retail.

"In argument it was plainly the purpose of plaintiff to recover solely upon the theory of the exemption set out in Administrator's Bulletin No. 6. With the bulletin, I find myself in disagreement * * *

* * *

"I see no application of the Arsenal and Kirschbaum cases here, as the particular reference therein to service establishments sheds no light on the view the Supreme Court entertained as to the soundness of Bulletin No. 6."

This decision was rendered thirty days after the Supreme Court's decision in the KIRSCHBAUM case.

The court below on two occasions has announced its disagreement with Interpretative Bulletin No. 6. In SUPER-COLD SOUTHWEST COMPANY v. MCBRIDE, 124 F. (2d) 90 (5th C.C.A.), JUDGE HUTCHESON, in commenting upon the Administrator's narrow definition of "retail establishment," said:

> "The Act is unambiguous and operates to exempt all those coming within its terms and those terms cannot be enlarged or diminished by rulings of the Administrator, such as that, because sales are made to commercial instead of to private users they are not sales at retail. If, therefore, defendant were otherwise a retail dealer, we should hold it exempt though the retail sales were made to commercial rather than to private users."

In WHITE MOTOR COMPANY v. LITTLETON, 124 F. (2d) 92 (5th C.C.A.), JUDGE HOLMES likewise repudiated the crippling definition of "retail" advocated by the Administrator. He said:

> "The word *retail* is not defined by the Act. Given its common and ordinary acceptation when used in sales parlance, it means a sale in small quantity or direct to the consumer, as distinguished from the word *wholesale*, meaning a sale in large quantity to one who intends to resell. The character of the sale is not altered by the use to which the consumer may put the purchased commodity. These sales were predominantly retail although the products sold were subsequently for commercial purposes." (Emphasis supplied by the court).

Petitioners have nothing but service to sell and that is all sold within a single state to ultimate consumers. The service that they sell is no different whether rendered at a private residence or at a plant engaged in the production of goods for interstate commerce. In fact two of petitioners' employees are regularly assigned to watch only one residence each, and another is assigned to watch only a dance hall (R. 35-36). If all of the watchman service consisted only of watching residences, then even respondent would concede that the employees are engaged in a service establishment. Now, if the Fifth Circuit Court of Appeals is correct in holding a sale may still be a retail sale although made to a *commercial* rather than a *private* user, then it must be equally true that petitioners' business is just as much a service establishment when it performs service for an *industrial or commercial client* as when it performs exactly the same kind of service for an *individual client at his residence*. The principles announced by the Fifth Circuit Court of Appeals in the two cases last quoted from above and in this case cannot be reconciled.

In HUNT v. NATIONAL LINEN SERVICE CORP., 157 S.W.

(2d) 608 (Tenn.), the Supreme Court of Tennessee held that a linen service company is a service establishment exempt under the Act even though some of its customers were industrial or commercial concerns, as distinguished from private families. The corporation leased its linen to clients and for a specified price kept it laundered. The court said:

> "We do not consider either the fact that defendant manufactures the linens and other supplies which it uses in some other state, or that some of defendant's customers are industrial or commercial business firms, as distinguished from private families, of controlling importance. This appears to have been given some significance through certain bulletins released by the Wage and Hour Administrator."

While the decisions are by no means uniform, and for this reason the question should be settled by an authoritive decision of this court, there are a number of cases which sustain the conclusion of the trial court that petitioners' employees are engaged in a service establishment within the meaning of the Act.

In WALLING v. SANDERS, (U.S.D.C., Tenn.) 5 W.H.R. 710, it appeared that the employer sold automatic phonographs to operators and likewise maintained a department for servicing the machines and installing "remote control" equipment on them. The machines were serviced both in the repair shop of the employer and on location, and the installation of the equipment was generally made on location. Approximately 90% of the sales and installations were within the State of Tennessee where the business was located. The court held that the business of selling, repairing and making installations on the automatic phonographs was exempt as constituting a retail and service establishment.

In BURKE v. BROWN BAGGAGE CO., (U.S.D.C., Tenn.), 5 W.H.R. 700, it was held that a taxicab company is a ser-

vice establishment. The particular employees who brought suit for alleged unpaid compensation under the Act were engaged in driving a truck which was used to carry baggage to and from railroad stations. This part of the business constituted only about 2% of the total business of the company, and at least 98% of the servicing was in intrastate commerce.

In CORBETT v. SCHLUMBERGER WELL SURVEYING CORP., 43 F. Supp. 605 (U.S.D.C., Tex.), it appeared that defendant was "engaged, with crews of men and patented mechanism belonging to it, in the business of logging wells and in the business of perforating the casing of wells drilled for the production of oil or gas, not for itself, but for others upon the leases of others. Plaintiff Corbett was * * * from time to time a member of one of its crews. Defendant had no interest in the wells upon which it and the plaintiff and its other employees worked, nor in the land or leases upon which the wells were located." The court held:

> "That defendant is a service establishment within the quoted provision, I entertain no doubt. It did not sell goods. It sold service. The service sold was service it was able to render because of patents owned by it and which presumably could not be rendered by any other person."

In GREEN v. EAST TEXAS MOTOR FREIGHT LINES, 1 W.H. Cases 1169 (Tex.), it was held that an employee of one performing pickup and delivery service for a common carrier motor freight line was not covered by the Act because employed in a service establishment.

In the court below, respondent also contended against the application of the service establishment exemption because petitioners' employees do not perform all of their work within the physical boundaries of petitioners' office. It was argued that "engaged in any * * * service establishment" refers only to employees who perform all of their service at their employer's place of business. Here again, respondent was insisting upon

too narrow a construction, and one which, if adopted, would lead to absurd results.

In his Interpretative Bulletin No. 6, respondent cites a home laundry as a typical example of a service establishment coming within the exemption. It is well known that a large percentage of the employees of most laundries consist of truck drivers who pick up dirty laundry from the customers and deliver clean laundry to them. These drivers spent only a small fraction of their time on the premises of the laundry building. If we follow respondent's argument, they would not be exempt because they are not employed exclusively within the physical boundaries of the laundry.

If respondent's argument is sound, then it applies equally to employees of a retail establishment. It would exclude from the exemption delivery truck drivers and outside buyers of every large retail store. It has often been held that these outside employees are exempt as being employees of a retail establishment.

In PRESCRIPTION HOUSE, INC., v. ANDERSON, 42 F. Supp. 874 (U.S.D.C., Tex.), it was held that the employer constituted a retail establishment and hence certain employees who spent practically all of their time in making outside deliveries were exempt under the Act.

The decisions clearly show that the words "engaged in any * * * service establishment" mean engaged in the work of any service establishment. They do not mean that the employees must be engaged within the physical boundaries of a particular office, shop or plant owned and operated by the employer. Otherwise the employees who service automatic phonographs on location in WALLING v. SANDERS, supra, the drivers of taxicabs and baggage trucks in BURKE v. BROWN BAGGAGE COMPANY, supra, the crew members in CORBETT v. SCHLUMBERGER WELL SURVEYING CORPORATION, supra, the truck drivers in LONAS v. NATIONAL LINEN SERVICE COR-

PORATION, supra, and the employees engaged in the freight pick-up and delivery service in GREEN v. EAST TEXAS MOTOR FREIGHT LINES, supra, could not have been, as they were held to be, exempt as employees of service establishments.

Petitioners respectfully submit that the court below erred in holding that their employees were not engaged in a service establishment exempt under the Act.

II.

The Circuit Court of Appeals, irrespective of the application of the service establishment exemption, erred in holding that any of petitioners' employees were covered by the Act; and this conclusion applies particularly to those employees whose service in watching the premises of one or more clients engaged in the production of goods for interstate commerce is but a small portion of the patrol service rendered by each such employee on each tour of duty.

The employees whom the court below held are subject to the Act fall into two groups:

(a) Those who devote their time exclusively to watching the premises of one client which is engaged in the production of goods for interstate commerce; and

(b) Those who serve from 16 to 29 clients on a single "beat," one or more of which clients are engaged in the production of goods for interstate commerce; but in no instance are more than 36 per cent of the clients on any beat engaged in such production, and in one instance the percentage is as low as 4.2 per cent.

The applicable provisions of the Act are:

"Section 3(j): 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any state.

"Section 6(a): Every employer shall pay to each of his employees who is engaged in (interstate) commerce or in the production of goods for (interstate) commerce wages at the following rates (here follows the specification of minimum rates)."

"Section 7(a): No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in (interstate) commerce or in the production of goods for (interstate) commerce (here follows specification of hours)."

The court below predicated the application of the Act to any of petitioners' employees solely upon the basis that they were engaged in a "process or occupation necessary to the production" of goods for interstate commerce. No other basis could possibly apply because it is obvious that the watchmen are engaged neither in interstate commerce nor in actual production of goods as they perform no service other than a night watching or patrol service.

While there are many decisions holding that watchmen employed directly by a concern engaged in the production of goods for commerce are covered by the Act, many of these cases can be distinguished on the ground that the watchmen performed some service other than merely watching, such as firing a boiler, and keeping up steam (WOOD v. CENTRAL SAND & GRAVEL CO., 33 F. Supp. 40 [U.S.D.C., Tenn.]), etc. Other decisions, dealing exclusively with watchmen who are engaged solely in watching the premises of their em-

ployer, hold that such watchmen, regardless of the business of the employer, are not covered by the Act. ROGERS v. GLAZER, 32 F. Supp. 990 (U.S.D.C., Mo.); HART v. GREGORY, 10 S.E. (2d) 644 (N.C.).

The only cases involving employees of an independent agency, rendering solely night watch and patrol services, have held that such employees are not covered by the Act, irrespective of the interstate activities conducted at the places watched. FARR v. SMITH DETECTIVE AGENCY AND NIGHT WATCH SERVICE, 38 F. Supp. 105 (U.S.D.C., Tex.); SCHRIEVER v. KANE SERVICE, I W.H. Cases 381 (U.S.D.C., Ill.); BARTHOLOME, ET AL., v. BALTIMORE FIRE PATROL & DESPATCH CO., 6 W.H.R. 21 (U.S.D.C., Md.).

The Circuit Court of Appeals felt that the decision of this Court in KIRSCHBAUM v. WALLING, supra, compelled a decision in this case that the Act applied to any employee who spent any part of his time watching the premises of a client engaged in the production of goods for interstate commerce. Petitioners submit that the KIRSCHBAUM case does not compel such a result. That case involved the owners of loft buildings. In addition to watchmen, they employed engineers, firemen, electricians, elevator operators, carpenters and porters. Practically all of the tenants were engaged within the building in producing goods for commerce. The activities of the employees of the two buildings are described by this Court as follows:

> "The engineer and fireman produce heat, hot water and steam necessary to the manufacturing operation. They kept elevators, radiators, and fire sprinkling systems in repair. The electrician maintained the system which furnishes the tenant with light and power. The elevator operators run both the freight elevators which start and finish the interstate journeys of goods going from and coming to the tenant, and the passenger elevators which carry employees, customers, salesmen and

> visitors. The watchmen protect the buildings from fire and theft. The carpenters repair the halls and stairways and other parts of the building commonly used by the tenant. The porters keep the building clean and habitable."

Thus it is readily apparent that the owners of the buildings, through their employees, contributed in large measure to the production of goods for commerce. A substantial part of this contribution was absolutely essential; without it, production would have been impossible. The case was defended on the ground that none of the employees were covered by the Act; no contention was made that, if some of the employees were covered, nevertheless others were not. The watchman service was but part of the total function performed by the building owners which included selling and maintaining space in the buildings, furnishing heat, light, steam, elevator service, etc. This Court treated the employees in each building as a unit making necessary, and in part indispensable, contributions to the production of goods for interstate commerce. This decision is a far-cry from holding that a watchman, employed, directed and paid by an independent agency and performing only a watching service for a concern engaged in the production of goods, is himself engaged in an occupation necessary for such production so as to be covered by the Act. This Court issued a clear warning in the KIRSCHBAUM case that its decision must not be misconstrued as we believe the court below has misconstrued it in this case. Among other things this Court said:

> "The lower court in No. 924 met the petitioners' argument by finding the act applicable to these employees because their work was 'in kind substantially the same as it would be if the manufacturers employed them directly.' In the immediate situation, the answer may be adequate; ***but as a guiding criterion it may prove***

> *too much.* 'Necessary' is colored by the context not only of the terms of the legislation but of its implication in the relation between state and national authority. We cannot, in construing the word 'necessary,' escape an inquiry into the relationship of the particular employees to the production of goods for commerce. *If the work of the employees has only the most tenuous relationship to, and is not in any fitting sense 'necessary' to, the production, it is immaterial that their activities would be substantially the same if the employees worked directly for the producers of goods for commerce."*

Petitioners submit that the work of its employees in providing exclusively a night watch and patrol service "has only the most tenuous relationship to, and is not in any fitting sense 'necessary' to, the production" of goods. To hold otherwise would be equivalent to bringing under the Act every employee, regardless of by whom employed, who had any remote, indirect connection with the production of goods. Such a decision would produce a *reductio ad absurdum,* such as is warned against in WARREN-BRADSHAW DRILLING CO. v. HALL, 124 F. (2d) 42, affirmed 63 S.C. Rep. 125, and JOHNSON v. FILSTOW, INC., 43 F. Supp. 920 (U.S.D.C., Fla.).

The foregoing applies to all of petitioners' employees, but it is particularly applicable to those who patrol "beats," each of which covers a large number of clients, only a very few of which are engaged in the production of goods for interstate commerce. The inapplicability of the KIRSCHBAUM case to such a situation is clearly pointed out in BARTHOLOME, ET AL., v. BALTIMORE FIRE PATROL & DESPATCH CO. (U.S.D.C., Md.), 6 W.H.R. 21. In that case the employer, an independent agency, furnished night patrolmen to contract customers. Each patrolman was placed on a "post" containing from 28 to 92 places to be watched. The trial judge com-

mented upon the similarity between our case and the case before him. After discussing and extensively quoting from the KIRSCHBAUM decision, the court said:

> "If this service rendered by the plaintiff is properly to be called watchman service at all, it is apparent that it is greatly lesser in degree than that of such a watchman as was referred to in the Kirschbaum case. *A difference in degree may amount to a difference in kind.* The services performed by the plaintiffs were substantially only supplemental to the ordinary activities of the public police on night duty. It would seem to be an extreme contention that the ordinary 'policemen on the beat' is engaged in the production of goods for interstate commerce.
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> " * * * I do not think it can be fairly said that the plaintiffs' services were 'necessary' in the production of goods for commerce, even if we could find that some of the defendants' customers were in fact producing goods for interstate commerce.
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> * * *
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> "Therefore here the word 'necessary' should at least connote 'substantially' necessary. The limited nature of the patrolman service given the buildings of the defendants' subscribers cannot fairly be said to be 'substantially' necessary to their business. It is common knowledge that thousands, and doubtless the great majority, of such business buildings do not have this special patrolman service, but rely on the ordinary public police protection."

Conclusion

For the reasons assigned, the court below erroneously decided questions of Federal law which have not been, but should be, settled by this Court. Petitioners respectfully pray that a writ of certiorari be issued herein to the end that said

errors may be corrected and the questions of Federal law settled by this court.

Respectfully submitted,

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Houston, Texas